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Radical Lawmakers in Colonial Massachusetts:
The "Countenance of Authoritie"
and the *Lawes and Libertyes*

DANIEL R. COQUILLETTE

An Address Delivered at the COLUMBUS QUINCENTENARY
"Il Diritto Dei Nuovi Mondi"
Università di Genova 5 November 1992

GENOVA, the city and its university, celebrated the Columbus Quincentenary in grand style during the fall of 1992. Among the festivities were a number of distinguished international conferences and addresses, including the conference "Il diritto dei nuovi mondi" (the "law of new worlds"), which both looked back to the historical effects of Columbus's discoveries on modern law and forward to the "new worlds" of the future, including the new legal worlds of computer technology, satellites, and space exploration. The following paper was delivered at that conference through the kind invitation and support of the University of Genoa, Professor Giovanna Visintini, and Professor Vito Piergiovanni.

With the reader's kind forbearance, I would like to "set the scene." Those familiar with modern Italy will accept at once the paradox of Janus, the bifrons Roman god of gates and doorways whose double face looks backward and forward simultaneously. The Columbus lectures, including those on space law and satellite communications, took place in the sixteenth-century Palace of the Jesuits. At intervals, meticulous waiters in white gloves served coffee from elegant silver pots. In the busy medieval streets

I am particularly grateful to my research assistant, Mark A. Walsh, whose hard work and intelligence is evident on every page of this paper and in the excellent Annotated Bibliography, for which he is responsible.

below, shops whose crumbling façades date from the Crusades offered the latest in avant-garde Italian design, be it handbags, furniture, automobiles, or calculators.

Genoa today is one of the largest and wealthiest ports in the world, the key southern outlet of the European Common Market. Vast ultra-modern sea and rail terminals serve dozens of ships concurrently, and the streets are crowded with sailors and silk-suited merchants from all corners of the globe. Here, unlike Venice, is no museum. In contrast to its archrival, Genoa lives and breathes. It is ancient and modern, tough and suave, all at once. The great palazzos are still occupied by families, banks, and institutions that can afford to shut their doors. The city's treasures are rarely seen, and private.

For the Quincentenary, however, the gates were opened to receive Genoa's guests. The receptions and dinners were simply stunning. My most vivid recollection is of arriving at a grand sixteenth-century palazzo in my rumpled suit, a victim of ten hours of flying, to watch the sleek, black Alfa Romeos pull down the medieval street and men and women of matchless Italian elegance, the family jewels glittering in the great gas torches, disembarking. Against the baroque fountains playing in the sunset, one could just see the detachment of Italian carabinieri, machine guns at the ready, who were guarding the event. Inside, a magnificent mural depicted the arrival of an earlier group of guests, probably for some sixteenth-century "Cleopatra's feast," all in the fancy dress of the day but with the same diamonds sparkling and the same armed guards, here clutching their halberds, standing watch. What the radical lawmakers of the early Bay Colony would have thought of this scene, I would not dare to guess, but one thing is certain: Columbus himself would have felt right at home in his native city.



DISTINGUISHED COLLEAGUES:

On behalf of North America, and particularly on behalf of the hundreds of thousands of North Americans who proudly trace their ancestry to Italy and, indeed, to Genoa, I congratulate you

on this great anniversary of your native son, Christopher Columbus.

The topic I would like to explore with you today concerns the ways in which the opening of the New World created radically different views about law in one of North America's oldest English colonies, Massachusetts, and how, in an extraordinary fashion, these new and creative approaches to law were indebted to Italy. For while the original settlers of Massachusetts were English Puritans, Protestant refugees who seem at superficial glance to have had little in common with the Latin world, in fact they were proud of their classical learning, and many of the books to be found in their libraries were in Latin, not English.¹ So if today I must address you in a barbaric tongue, many of the earliest leaders of the Massachusetts Bay Colony would have suffered no such embarrassment. Indeed, fluency in Latin, and Hebrew too, was crucial to their definition of an educated leader, as their 1636 founding of Harvard College, "first flower of their wilderness," so strongly attests.

The "Countenance of Authoritie"

It would be impossible to survey the legal history of colonial Massachusetts in the time allotted for my paper today. Spanning the eventful years between the landing of the ship *Arbella* in 1630, which carried to the New World not only the founders of Boston but the Massachusetts Bay Colony Charter, to the outbreak of violent revolution in the dawn hours of 19 April 1775,

¹See Hugh Amory, *First Impressions: Printing in Cambridge, 1639–1989* (Cambridge: Harvard University Press, 1989), pp. 43, 46, 49. For example, Amory notes, Richard Bellingham, who became Governor in 1665, brought with him a Glanville *Tractatus de legibus & consuetudinibus regni Angliae* (1604) bound with a Latin version of St. Germain's *Doctor & Student, Dialogus de fundamentis legum Angliae et de conscientiae* (1604) (p. 49). As we shall see, there was a *Corpus Juris Civilis* in the Harvard College Library (ed. Jacques Cujas, 1625) at least by 1723, when the first library catalogue was completed. The library burned in 1764, so it is impossible to say how early the *Corpus Juris Civilis* was acquired, but there is no reason to believe that it was not purchased fairly soon after the foundation of the library in 1638. As Amory observes, "The Library catalogue of 1723 lists only twelve Anglo-American law books, mostly statutes; there were vastly more works of Roman and civil law" (Amory, *First Impressions*, pp. 43, 46). See Samuel E. Morison, *The Founding of Harvard College* (Cambridge: Harvard University Press, 1935), pp. 263–70; *Harvard College in the Seventeenth Century* (Cambridge: Harvard University Press, 1936), pp. 285–97.

this period included nearly six generations of Americans and their laws.² Instead, I intend to concentrate on just one example of this rich and exciting heritage, the famous *Book of the General Lawes and Libertyes Concerning the Inhabitants of Massachusetts* (hereafter the *Lawes and Libertyes*). First printed in 1648, it was truly the “first flower” of American jurisprudence.

The *Lawes and Libertyes* were concerned with what the colonists called the “Countenance of Authoritie.” By this they meant the process by which the coercive power of the Commonwealth was exercised. This “Countenance” could represent either justice or tyranny, depending on the nature of the process. To the Massachusetts colonists, who were escaping political and religious oppression, the difference between a good and evil “Countenance” lay in the rule of law, to which they were passionately devoted. The opening passage of the *Lawes and Libertyes* makes this abundantly clear.

That no mans life shall be taken away; no mans honour or good name shall be stayned; no mans person shal be arrested, restrained, bannished, dismembered nor any wayes punished; no man shall be deprived of his wife or children; no mans goods or estate shall be taken away from him; nor any wayes indamaged under colour of law or Countenance of Authoritie unles it be by the vertue or equity of some express Law of the country warranting the same established by a General Court & sufficiently published; or in case of the defect of a law in any particular case by the word of God.³

These words issued from the first printing press in North America only eighteen years after their authors landed in what was almost unbroken wilderness. There can be no doubt that the *Lawes and Libertyes* was the first great printed affirmation of the American rule of law and of that particular “Countenance of Au-

²For a full survey, see *Law in Colonial Massachusetts, 1630–1800*, ed. Daniel R. Coquillette, Robert J. Brink, Catharine S. Menand (Boston: Colonial Society of Massachusetts, 1984).

³*The Laws and Liberties of Massachusetts* (reprinted from the 1648 edition), ed. M. Farrand (Cambridge: Harvard University Press, 1929), p. 1. See also the photofacsimile edition, *The Book of the General Lawes and Libertyes Concerning the Inhabitants of Massachusetts*, ed. Thomas G. Barnes (San Marino, Calif.: Huntington Library, 1975), p. 1. Due to the clarity of the 1929 reprinting, reference will usually be made to that edition rather than the occasionally faint facsimile edition of 1975. The pagination of the text is identical in both modern editions.

thoritie" for which it stands. Today, nearly three hundred and fifty years later, it remains among the most remarkable.

*The Early Efforts: "Moses his Judicials" (1636)
and "The Body of Liberties" (1641)*

Led by the *Arbella*, a battered flotilla of seventeen tiny ships arrived, one by one, off the rugged north shore of Massachusetts throughout the early summer of 1630. Aboard were one thousand and five immigrants, many ill and the majority anxious about the wilderness before them and the hostile English government of uncertain intent they had left behind. Yet fears were overmatched by enormous dreams, for smuggled on board at the last moment was the precious royal Charter of 1629, which granted the colony's leaders "full and absolute power and authority to correct, punish, pardon, govern and rule . . . according to the orders, laws, ordinances, instructions, and directions aforesaid, not being repugnant to the laws and statutes of our realm of England."⁴ At the last minute as well, those proprietors not on the ship, wealthy Puritans in London whom the Crown had hoped to use as checks on the colony's independence, had resigned *en masse* in favor of leaders on the ship, thus freeing the colony entirely from direct control. Fervent religious refugees, with the hope of establishing a "City Upon a Hill" as a beacon to a sinful Europe, the colonial leaders were conscious of making history. As they drew close to that grey Massachusetts coast, they knew that the new order would have to be legal, as well as religious, in character.

The refugees on the ship were highly educated, and they included leaders with substantial legal training. John Winthrop, the first Governor, was a member of Gray's Inn and Inner Temple and an attorney to the Court of Wards and Liveries. His son, John Winthrop, Jr., was also a trained lawyer, as were Isaac Johnson, John Humfry, Roger Ludlow, Richard Bellingham, Simon Bradstreet, Herbert Pelham, Thomas Dudley, and Nathaniel

⁴*The Charters and General Laws of the Colony and Province of Massachusetts Bay*, Published by Order of the General Court (Boston, 1814), p. 15. In a great historical irony, the first page of the priceless Charter of 1629 was stolen in 1984 and recovered in a drug raid.

Ward.⁵ They were well acquainted with a fully developed legal system in their home country, complete with great legal guild halls, the Inns of Court, and an extensive professional literature with many hundreds of specialized treatises. They were also comfortable with a system of civil procedure based on writs and causes of action which was centuries old, a trained and professional judiciary sitting in ancient and established courts, and a rapidly emerging system of law reports, including *Plowden's Reports* (1571), *Dyer's Reports* (1585), *Croke's Reports* (1582–1641, published 1657, 1661), and the famous *Reports* of Edward Coke (1600–1615, 2 volumes posthumously published 1655, 1658).⁶ Most important, the English legal profession was, by 1630, rigidly structured, with its own “universities” in the Inns of Court and its own, highly characteristic methods of legal training and jurisprudence, built almost exclusively around the common law courts.⁷ With this system, the founders of Massachusetts were intimately familiar. To be sure, some were members of these powerful professional guilds or graduates of their training programs.

We should note here one important exception to the dominant common law tradition in England. Legal education in the English “ancient universities” had always focused on Roman-based civil and canon law and, after Henry VIII’s “reforms,” they taught Roman civil law exclusively. The actual law of the royal courts, the “common law,” was not to be taught at Oxford or Cambridge until Blackstone’s famous lectures in 1758. Further, certain specialized English courts, most notably the Court of Requests and the Admiralty Court, traditionally applied the civil, not the common, law.⁸

⁵See my “Introduction: The ‘Countenance of Authoritie,’” in *Law in Colonial Massachusetts*, pp. xxvii–xxviii.

⁶See John P. Dawson, *The Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968), pp. 65–80; J. H. Baker, *An Introduction to English Legal History* (London: Butterworths, 1990), pp. 204–14.

⁷See Baker, *English Legal History*, pp. 177–99; Wilfrid R. Prest, *The Inns of Court under Elizabeth I and the Early Stuarts, 1590–1640* (London and Totowa, N.J.: Rowan and Littlefield, 1972); J. H. Baker, *The Third University of England: The inns of court and the common law tradition*, Selden Society Lecture (London, 1990).

⁸See my *The Civilian Writers of Doctors Commons, London* (Berlin: Duncker and Humblot, 1988), pp. 22–32.

The Puritans valued university education, and an extraordinarily high percentage of original settlers in the Massachusetts Bay Colony were university graduates, particularly of the nonconformist colleges at Cambridge, such as Emmanuel, the model for Harvard.⁹ Indeed, it has been remarked that there were books on Boston's Beacon Hill while there were still "wolves on the slopes." It was true.

Given this high level of education, the strong professional tradition of the English common law by 1630, and the provisions of the Charter that the colonial laws not be "repugnant" to the English law, one might expect that the Puritans would have established a largely English legal system in Massachusetts. This was certainly the intent of the English government, but it was realized in only a very limited way. True, the language of the law was English, and certain important institutions, such as the jury and the justice of the peace, were adapted to New World conditions. But there were to be no law reports in Massachusetts until nearly two centuries later,¹⁰ no formal organization of the bar for more than a century,¹¹ no formally trained judiciary for more than a century,¹² and only the seeds of a successful practicing bar for generations.¹³ None of this could be explained by lack of educational institutions, illiteracy, lack of a printing press, or lack of an

⁹See Morison, *Founding of Harvard*, pp. 60–116, 148–209, and *Harvard in the Seventeenth Century*, pp. 3–25. For the familiarity later American lawyers demonstrated with Roman law precedents, see my "Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758–1775," in *Law in Colonial Massachusetts*, pp. 359–418, and R. H. Helmholz, "Use of the Civil Law in Post-Revolutionary American Jurisprudence," *Tulane Law Review* 66 (June 1992): 1649.

¹⁰John D. Cushing, "Sources for the Study of Law in Colonial Massachusetts at the Massachusetts Historical Society," in *Law in Colonial Massachusetts*, p. 584.

¹¹See my "Justinian in Braintree," p. 376.

¹²George L. Haskins, "Lay Judges: Magistrates and Justices in Early Massachusetts," in *Law in Colonial Massachusetts*, pp. 39–55, and my "Justinian in Braintree," p. 376.

¹³Thomas G. Barnes, "Thomas Lechford and the Earliest Lawyering in Massachusetts," in *Law in Colonial Massachusetts*, pp. 3–38. There was still a shortage of lawyers in 1689, when the Governor's secretary wrote to England:

I have wrote you the want we have of two, or three, honest attorneys, (if any such thing in nature).

Edward Randolph, Secretary to Governor Andros,
Letter to England 1689.

See my introduction to *Law in Colonial Massachusetts*, pp. xxi.

indigenous colonial legal literature. Not only was Harvard College in full operation, but the settlers had excellent primary schools, were highly literate, and had a printing press operating in Cambridge by 1638, the first in North America. Finally, there was indeed a flourishing colonial legal literature, but it was radically different in emphasis from its English counterpart.

Much of it could be explained, of course, by the very reasons for founding the colony, at least from the Puritans' perspective. They were religious refugees, who sought to establish a society where "God's will was done," or at least done more so than in England.¹⁴ Further, they believed firmly in the "priesthood of all believers," all of whom should be able to apprehend God's will directly from the Holy Scriptures; thus Latin, Greek, and Hebrew languages were studied by the learned, and good, plain translations of the Scriptures in English were made available for the less-educated settlers, as were Indian translations for the Native Americans the Puritans met and sought to convert.

But, if access to God's Law could, and should, be open to all believers, surely the same should be true of the secular law. And if there was no need for a "priesthood" to provide access to God's Law, surely a "priesthood" of lawyers was even more of an abomination. To the early Puritan leaders, religious learning was highly desirable, as was legal learning, but professional barriers to lay knowledge were shunned, both in a theological and a legal context. For this reason, colonial leaders expelled Massachusetts' first practicing lawyer, Thomas Lechford, in 1641 and initially ruled against representation in Court by paid counsel.¹⁵ Again, the colony's early political leaders were trained lawyers themselves and considered legal learning, including Lechford's, useful. But, in complete contrast to the English models they had left behind, they were opposed to a professionalization of their system of justice. Lawyers such as Lechford were tolerated as long as they gave learned advice, but Lechford was accused of jury

¹⁴See George L. Haskins's classic *Law and Authority in Early Massachusetts* (New York: Macmillan, 1960), pp. 1-93.

¹⁵Clause 26 of "The Body of Liberties" of 1641 stated that "every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines," but this clause was one of the few in "The Body of Liberties" to be dropped by the *Lawes and Liberties* in 1648. See Barnes, "Thomas Lechford," pp. 3-38.

tampering and of questioning the religious orthodoxy of the colony. He had to go, and was not replaced for years, despite the highly litigious nature of the colonists.¹⁶

The early products of the Cambridge printing press were also evidence of these strongly held beliefs about the accessibility of law as well as religion. The first North American imprint, run on the press in 1638 or 1639, was a legal document, "The Oath of a Free Man."¹⁷ Over its active life, from 1638 to 1692, legal publications were nearly as important to the business of the press as religious tracts and academic work for Harvard. Nearly forty legal imprints were published. Most strikingly, none were reprints of English law books. All were original to the colony.

Of all of these, the most important was the *Lawes and Libertyes* of 1648. This extraordinary book was the result of a deliberate and careful attempt to publish all "lawes of generall concernment" for the edification of all citizens. Even more important, it attempted to define the rights and duties of all inhabitants of the colony in a specific and positive way.¹⁸ As such, it was quite unlike anything previously known to the preceding seven centuries of the English common law.

The book was a direct outcome of a political struggle within the colony between the magistrate class and the freemen. The magistrate class consisted of the Governor, the Deputy Governor, and the eighteen Assistants, who were given executive power by the Charter of 4 March 1629. The freemen of the colony were those who assembled in the annual General Court, first in person and then through elected deputies. Almost without exception, the freemen were also members of the established church and men of substance but not as prominent as the magistrates. At first, the magistrates resisted efforts to share power and even refused to show the Charter to the freemen and their deputies. By 1635, pressure from the freemen had resulted in the formation of a committee of magistrates and deputies to "make a draught of such lawes, as they shall judge useful for the well or-

¹⁶Barnes, "Thomas Lechford," pp. 11-38.

¹⁷See Amory, *First Impressions*; George Parker Winship, *A Preliminary Check List of Cambridge, Massachusetts, Imprints, 1638-1692* (Boston: Colonial Society of Massachusetts, 1939), p. 1.

¹⁸See Barnes, introduction to *Lawes and Libertyes*, pp. 5-10.

dering of this plantation." As John Winthrop observed: "The deputies having conceived great danger to our state in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions, it was agreed, that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministeries and the general courts, should be received for fundamental laws."¹⁹

Between 1635 and 1639 a number of experiments were undertaken, and at least two very different draft codes were created. One was by Boston's eminent divine, the Rev. John Cotton. A second was by another clergyman, but one with extensive prior legal training in England, the Rev. Nathaniel Ward.²⁰

Cotton's draft was entitled "Moses his Judicials." Although it was presented to the General Court as early as October 1636, it was never printed in America. It was, however, printed in London in 1641 under the title *An Abstract Or [sic] the Lawes of New England, As they are now established*. Reprinted in London in 1655, when it was first attributed to Cotton, the book probably resulted from a mistake by one of Cotton's London correspondents who, having received Cotton's draft manuscript, wrongly assumed it had been adopted into law by the colony.²¹

Indeed, Cotton's code was never to be adopted. Deriving the authority for all regulation of property rights, commerce, military affairs, and punishment from biblical authority, Cotton emphasized the colonial government's sources of power, not its limitations. Cotton closed his draft with stern, yet hopeful, lines from Isaiah 33.22: "The Lord is our Judge, the Lord is our Lawgiver, the Lord is our King, He will save us."²² This was hardly the document the freemen sought. It set out few, if any, restraints on the

¹⁹William H. Whitmore, introduction to *The Colonial Laws of Massachusetts. Reprinted from the edition of 1660, with the supplements to 1672* (Boston: Published by order of the City Council, 1889), pp. 2, 4, 5.

²⁰Whitmore, *Colonial Laws*, p. 9.

²¹Cushing, "Sources for the Study of Law in Colonial Massachusetts at the Massachusetts Historical Society," p. 570.

²²*An Abstract of the Laws of New England* (London, 1641), in Thomas Hutchinson's *A Collection of Original Papers Relative to the History of the Colony of Massachusetts Bay* (Boston: Thomas and John Fleet, 1769), republished as *Hutchinson Papers* (Albany, N.Y.: J. Munsell, 1865; reprinted, New York: B. Franklin, 1967), pp. 183, 205.

magistrates' power. It was, however, remarkable in one respect. Not one word of "Moses his Judicials," as embodied in the *Abstract*, referred to the authority of the English Crown, or even to English law. As such, its London printing was, in itself, significant. Appearing in the midst of tempestuous times there, the document is an example of how colonial legal thought was influencing England, rather than, as one might expect, England influencing the colonies. But again, and the point bears repeating, "Moses his Judicials" never became law in Massachusetts.²³ As the dedicatory epistle to the *Lawes and Libertyes* states, "[a]bout nine years since [1639] wee used the help of some of the Elders of our Churches to compare a modell of the Iudiciall lawes of Moses . . . with intent to make use of them in composing our lawes, but not to have them published as the lawes of this Jurisdiction: nor were they voted in Court."²⁴

Much more successful was the draft prepared by Nathaniel Ward, called "The Body of Liberties." This draft was certainly finished and circulated by 1639. The epistle to the *Lawes and Libertyes* of 1648 states that "The Body of Liberties" was "published about seven years since [1641]," but no printed copy has ever been found. We do know that it was circulated in manuscript form to every town and discussed so "that if any man should think fit, that any thing therein ought to be altered, he might acquaint the same for the deputies therewith against the next Court." Apparently, Cotton's draft was circulated with it. According to John Winthrop's notes of November 1639:

The people had long desired a body of laws, and thought their condition very unsafe, while so much power rested in the discretion of mag-

²³Whitmore, *Colonial Laws*, pp. 12–13. "The next step is shown by the order passed by the General Court, November 5, 1639 (Records, i. 279), viz.:—"

It is ordered that the Governor [J. Winthrop], Deputy Governor [Thomas Dudley], Treasurer and Mr. Stoughton or any three of them, with two or more of the deputies of Boston, Charlestown or Roxbury, shall peruse all those models which have been or shall be further presented to this Court, or themselves, concerning a form of government and laws to be established, and shall draw them up into one body, (altering, adding or omitting what they shall think fit,) and shall take order, that the same shall be copied out and sent to the several towns, that the elders of the churches and freemen may consider of them against the next General Court, and the charges to be defrayed by the Treasurer. [P. 7]

²⁴Barnes, *Lawes and Libertyes*, p. A2.

istrates. Divers attempts had been made at former courts, and the matter referred to some of the magistrates and some of the elders; but still it came to no effect; for, being committed to the care of many, whatsoever was done by some, was still disliked or neglected by others. At last it was referred to Mr. Cotton and Mr. Nathaniel Warde, &c., and each of them framed a model, which were presented to this General Court, and by them committed to the Governor and Deputy and some others, to consider of, and so prepare it for the Court in the third month next. Two great reasons there were, which caused most of the magistrates and some of the elders not to be very forward in this matter. One was, want of sufficient experience of the nature and disposition of the people, considered with the condition of the country and other circumstances, which made them conceive, that such laws would be fittest for us, which should arise *pro re nata* on occasions, &c., and so the laws of England and other states grew, and therefore the fundamental laws of England are called customs, *consuetudines*. 2. For that it would professedly transgress the limits of our charter, which provide, we shall make no laws repugnant to the laws of England, and that we were assured we must do. But to raise up laws by practice and custom had been no transgression; as in our church discipline, and in matters of marriage, to make a law that marriages shall not be solemnized by ministers, is repugnant to the laws of England; but to bring it to a custom by practice for the magistrates to perform it, is no law made repugnant, &c. At length (to satisfy the people) it proceeded, and the two models were digested with divers alterations and additions, and abbreviated and sent to every town, (12) to be considered of first by the magistrates and elders, and then to be published by the constables to all the people, that if any man should think fit, that any thing therein ought to be altered, he might acquaint some of the deputies therewith against the next Court."²⁵

²⁵Whitmore, *Colonial Laws*, pp. 7-9. See Morris L. Cohen, "Legal Literature in Colonial Massachusetts," in *Law in Colonial Massachusetts*, pp. 250-51. The records of the General Court of 7 October 1641 state that "The Governor [Bellingham] and Mr. Hawthorne were desired to speak to Mr. Ward for a copy of the Liberties and of the Capital laws to be transcribed and sent to the several towns" (Whitmore, p. 9). The records of 10 December 1641 also stated that "Mr. Deputy Endicot, Mr. Downing, and Mr. Hawthorne are authorized to get nineteen copies of the Laws, Liberties and the forms of oaths transcribed and subscribed by their several hands, and none to be authentic but such as they subscribe, and to be paid for by the Constable of each Town, ten shillings a piece for each copy, and to be prepared within six weeks" (Whitmore, p. 9). These records indicate that "The Body of Liberties" was transcribed, not printed.

According to Whitmore, some of the copies were made by Thomas Lechford, as appears by his "Note Book" (Boston, 1885, pp. 237-38). Lechford recorded that:

Fortunately, a manuscript copy of "The Body of Liberties" has survived, and it was first printed in 1889.²⁶ Unlike Cotton's draft, it enumerates the fundamental rights of the colonial inhabitants rather than justifications for the government's authority. It was organized, like a classical Roman code, by theoretical categories. It first listed the rights and duties of all colonists and then described the rights and duties associated with more specific conditions: i.e., (II) "Rites, Rules and Liberties concerning Juditial proceedings," (III) "Liberties more peculiarie concerning the free men," (IV) "Liberties of Woemen," (V) "Liberties of Children," (VI) "Liberties of Servants," (VII) "Liberties of Forreiners and Strangers," (VIII) "Off the Bruite Creature," (IX) "Capitall Laws," and finally (X) "A Declaration of the Liberties the Lord Jesus hath given to the Churches." As stated in the preamble, "We hould it therefore our dutie and safetie whilst we are about the further establishing of this Government to collect and expresse all such freedoms as for the present we foresee may concerne us."²⁷

"The Body of Liberties" must have met with great approval,

I writt 5 copies more of the Lawes for the Country by the direction of our Governor. 11.8. 1639. Seven of them and the former had 3 lawes added. A Coppie of the Abstract of the Lawes of New England delivered to the Governor, 11.15.1639. And 12 copies of the said Lawes first delivered, vizt., in 10 last. For writing a Coppy of the breviat of the body of Lawes for the Country. 12.5.39. The 3 lawes added to the Copie of Lawes for Dorchester, delivered to the Constable, 12.6.1639. The 3 lawes added to 4 more of the said Coppies brought by the marshall. 12.11.39. Three Copies of the said breviat delivered to the Governor besides the first, 12.12.1639. . . . One copy of the said breviat delivered to Mr. Bellingham, with one copy of the originall Institution and limitation of the Council, 12.17.1639. Seven coppies more of the said breviat. [Whitmore, p. 8, n.6]

Again, despite all these transcribed manuscript versions, no printed copy of "The Body of Liberties" is known. See Thorp L. Wolford, "The Laws and Liberties of 1648," in *Essays in the History of Early American Law*, ed. David H. Flaherty (Chapel Hill: University of North Carolina Press, 1969), pp. 147–85. In his *Preliminary Check List*, Winship reserved an entry for a possible printing (p. 1), and it has been assigned an "Evans Number," i.e. No. 6. It is not inconceivable that a printed copy might turn up.

²⁶Whitmore, *Colonial Laws*, pp. 29–61. The manuscript was preserved in a volume kept by Elisha Hutchinson, the grandfather of Thomas Hutchinson. It is now in the Boston Athenaeum, Ms.-L-350. The 1889 edition reproduces the manuscript in facsimile, each page faced by a printed text version. (Whitmore, pp. 10–11).

²⁷Whitmore, *Colonial Laws*, p. 33. According to Governor Winthrop, the "bodye of lawes, formerly sent forth amonge the 'ffreemen" was actually "voted to stand in force" by the General Court in 1641. See vol. 1 of *Records of the Governor and Company of Massachusetts Bay*, ed. Nathaniel B. Shurtleff (Boston: William White, 1853), p. 346.

for almost all of its provisions were ultimately incorporated into the *Lawes and Libertyes*. Some of the provisions, particularly those related to extending dower rights of women and abolishing pure primogeniture (stated as a "Libertie of Children") were radically different from English law. Others, such as the strict rules against battering wives or servants, demonstrated advanced humanitarianism. The laws protecting "Bruite Creatures" were the first extensive animal protection laws to be proposed anywhere. And, like Cotton's draft, there was absolutely no reference to the Crown, the Charter, or to English authority. Nothing like this had been seen before. This was a totally new initiative in lawmaking.

There was one section of "The Body of Liberties," however, that was relatively primitive in its bluntness and that relied entirely on Old Testament authority: a listing of all crimes punishable by death, the so-called "Capitall Laws." Whether this section was Ward's work or the product of an earlier hand, it was printed separately in 1642 as a broadside. It was also reprinted in England in 1643.²⁸

The conclusion of "The Body of Liberties" established a three-year period for experimental consideration:

Lastly because our dutie and desire is to do nothing suddainlie which fundamentally concerne us, we decree that these rites and liberties,

²⁸*The Capitall Lawes of New-England* (London: B. Allen, 1643). See Amory, *First Impressions*, p. 55. *The Capital Laws of 1642* was hardly a sophisticated document. It listed all crimes for which the death sentence was imposed, beginning with idolatry and witchcraft. The only "legal" authority cited was the Old Testament. Thus, the first two sections read, as follows:

Sect. I

If any man after legal conviction shall have or worship any other God but the Lord God, he shall be put to death. Exod. 22. 20. Deut. 13. 6, 10. Deut. 17. 2, 6.

Sect. 2

If any man or woman be a witch, that is, hath or consulteth with a familiar spirit, they shall be put to death. Exod. 22. 18. Levit. 20. 27. Deut. 18. 10, 11.

But the purpose of the document was salutary, to warn all in the colony, in clear, plain language, of the various causes for which they might be executed. As such the broadside was widely read in the colony, and specific measures were taken to ensure that it was taught to children and apprentices. Two thousand copies were printed, but they went out slowly, with Watertown voting as late as 1674 to require that "Each man heave in his house a copy" to be paid for out of the rates. Today, only two copies survive, both London reprints. See Amory, *First Impressions*, p. 13, where he attributes the drafting of the *Capitall Lawes* to Nathaniel Ward.

shall be Audably read and deliberately weighed at every Generall Court that shall be held, within three yeares next insueing, And such of them as shall not be altered or repealed they shall stand so ratified, That no man shall infringe them without due punishment.

And if any Generall Court within these next thre yeares shall faile or forget to reade and consider them as abovesaid. The Governor and Deputy Governor for the time being, and every Assistant present at such Courts shall forfeite 20sh. a man, and everie Deputie 10sh. a man for each neglect, which shall be paid out of their proper estate, and not by the Country or the Townes which choose them, and whensoever there shall arise any question in any Court amonge the Assistants and Associates thereof about the explanation of these Rites and liberties, the Generall Court onely shall have power to interprett them.²⁹

At the end of this experimental period, political events in the colony forced more drastic measures. In 1646, the General Court was confronted by a *Remonstrance and Petition* issued by Robert Child and six other non-freemen. Their complaint was that the government of the colony was arbitrary and not consistent with the laws of England, as required by the Charter. They further attacked the Puritan theocracy by denying the government's right to require church attendance, to levy taxes to support Puritan ministers, and to restrict freemanship—and thus the ability to vote and hold office—to church members.³⁰ The remonstrants claimed that members of the Church of England were thus abused, and they threatened to appeal to England directly. They even cited the high mortality rate and a recent plague as evidence of divine disapproval of the colony.

The General Court responded in a long document, the *Declaration of 1646*, which attacked the text of the *Remonstrance* and asserted that the colonial government was indeed consistent with the Charter and the laws of England, although the *Declaration* added, parenthetically, that such laws had been supplemented by “words of eternal truth and righteousness.”³¹ Close examination of the *Declaration*'s parallel citation of colonial and English law, however, has shown that its arguments are dangerously

²⁹Whitmore, *Colonial Laws*, p. 61.

³⁰Whitmore, *Colonial Laws*, pp. 15–16.

³¹Whitmore, *Colonial Laws*, pp. 15–16.

loose at best and at worst deliberately deceiving.³² Most revealing, it was only with this document, and when they were under attack, that the Puritan leaders finally felt compelled to refer specifically to English law and the Charter.

The leaders may even have lacked English law books, at least initially. On 11 November 1647, doubtless in reaction to the *Remonstrance*, the General Court, "to the end we may have better light for making and proceeding about lawes," ordered four English law books in double copies: "[F]or the use of the Courte from time to time:—Two of Sir Edward Cooke upon Littleton; two of the Books of Entryes; two of Sir Edward Cooke upon Magna Charta; two of the New Tearmes of the Lawe; two Dalton's Justice of Peace; two of Sir Edward Cooke reports." By November 1647, clearly before these English law books could have arrived, the General Court had already ordered that the colonial "lawes . . . be put in print" and that another committee be formed "for perfecting the lawes."³³ From this committee's proceedings would emerge the famous *Lawes and Libertyes* of 1648.

The "Lawes and Libertyes" of 1648

The *Lawes and Libertyes* was an extraordinary achievement. The first printed collection of laws in North America, it was published by the new press in Cambridge in 1648, exactly ten years after the press's foundation and only eighteen after the landing of the *Arbella*.³⁴ There can be no doubt that the primary source was Ward's unprinted "Body of Liberties" (1641), for whole sections were extracted from it almost verbatim, including almost all of the new safeguards for oppressed women, servants, children, and animals. The three-year "discussion period" that followed the circulation of Ward's document also produced many amendments and new provisions. Indeed, while the *Lawes and*

³²Richard B. Morris, "Massachusetts and the Common Law: The Declaration of 1646," in *Essays in the History of Early American Law*, pp. 135–46.

³³Farrand, introduction to *Laws and Liberties*, p. vii.

³⁴Hailed at its discovery in 1906 by the American newspapers as "The Most Valuable American Printed Book," only one copy has survived of 600 originally printed. See Wolford, "The Laws and Liberties of 1648," p. 147.

Libertyes incorporated many previously enacted laws, a full one third of the text was totally new. Another new, rather startling, development was that unlike any previous English book, but very much like Justinian's *Institutes*, the *Lawes and Libertyes* was, upon publication, enacted into law.

The *Lawes and Libertyes* began with an epistle dedicatory. Like the great preamble to Justinian's *Institutes*, the epistle dedicatory argued the case for the rule of law. Comparing "a Commonwealth without lawes" to a "Ship without rigging and steeradge," it even reflected similar passages in the *Institutes*.³⁵ Indeed, three Latin maxims are included, two of which, "*Qui sentit commodum sentire debet et onus*" and "*Nihil simul natum et perfectum*," are also found in Coke's writings; the third, "*Crescit in Orbe dolus*," is directly ascribed by the epistle to "the Civilian" [Justinian].³⁶ The English lawbooks ordered in November of 1647 probably did not arrive in time to be the source for these quotations, for printing had already commenced by No-

³⁵See appendix, and Justinian's *Institutes*, "Prooemium," ed. and trans. T. C. Sandars, 7th ed. (Oxford: Longmans, Green, 1962), pp. 1-2. The Romans used the symbolic dichotomy between "arms" and "laws," i.e., "made glorious by arms, but also strengthened by laws, that, alike in time of peace and time of war, the state may be well governed" (p. 1). There is even a sailing analogy. "When we had arranged and brought into perfect harmony the hitherto confused mass of imperial constitutions, we then extended our care to the vast volumes of ancient law; and, sailing as it were across the mid-ocean, have completed, through the favor of heaven, a work that once seemed beyond hope" (pp. 1-2).

³⁶See *Lawes and Libertyes*, epistle dedicatory, n.p. As to the *Qui sentit* maxim, roughly translated "He who enjoys the benefit ought also to bear the burden; and the contrary," see Edward Coke, *Reports, Part 1* (London, 1600), p. 99a; *Second Part of the Institutes of the Lawes of England* (London, 1642), p. 489; [E. Hilton Jackson] *Latin for Lawyers* (London: Sweet and Maxwell, 1960), p. 217 (maxim 891); Herbert Broom, *A Selection of Legal Maxims*, 10th ed. updated by R. H. Kersley (London: Sweet and Maxwell, 1939), pp. 482-86. As to the *Nihil simul* maxim, roughly translated "Nothing is born and perfected simultaneously," see Edward Coke, *First Part of the Institutes of the Lawes of England* (London: Companie of Stationers, 1628), p. 230a, "*Nihil simul inventum est et perfectum*"; *Latin for Lawyers*, p. 190 (maxim 681). Finally, as to the "*Crescit in Orbe dolus*," see Coke, *Second Part of the Institutes*, p. 479, "*crescente malitia crescere debet et poena*"; [Jackson], *Latin for Lawyers*, p. 131 (maxim 160).

I am still researching the full classical derivations of the maxims. For the importance and history of *regulae iuris* and maxims as sources of law, see Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxim* (Edinburgh: University Press, 1966). Francis Bacon and other English jurists experimented with maxim and aphorism as a way of "storing" legal authority that was more rational and reflective than case law and statutes. See my *Francis Bacon* (Stanford and Edinburgh: Stanford University Press, 1992), pp. 35-48, 237-56.

vember 1647. We can only speculate that the writers may have had opportunity to reference the *Corpus Juris Civilis* of 1625, edited by Jacques Cujas, which was listed in the first Harvard library catalogue of 1723 under the headings "Corpus," "Digestum," "Dayoz" (for the index by Esteban Dayoz), "Justinianus," and "Infortiatum."³⁷

In all events, the most Roman feature of the *Lawes and Libertyes* was not its appeal to Latin maxims but the very juristic theory informing the book. Specifically, the principles guiding the nature of laws to be included and excluded and the process of publishing a "complete" *corpus* of law were truly Roman. Thus, the epistle makes it clear that the *Lawes and Libertyes* is not a restatement of fundamental rights, like the Magna Carta, but positive civil law, in the strict sense. The epistle reads:

*For that book intituled The Liberties &c: published about seven years since (which containes also many lawes and orders both for civil & criminal causes, and is commonly (though without ground) reported to be our Fundamentalls that wee owne as established by Authoritie of this Court, and that after three years experience & generall approbation: and accordingly we have inserted them into this volume under the severall heads to which they belong yet not as fundementalls, for divers of them have since been repealed, or altered, and more may justly be (at least) amended heerafter as further experience shall discover defects or inconveniences for Nihil fimul natum et perfectum. The same must we say of this present Volume, we have not published it as a perfect body of laws sufficient to carry on the Government established for future times, nor could it be expected that we should promise such a thing.*³⁸

Unlike "The Body of Liberties," this was not to be a "Declaration of Rights" but a true civil code, to be modified and reenacted as needed. Each entry in the code was law but not all law was embodied in the code. Thus, the epistle indicated:

And in this (we hope) you will finde satisfaction, by the help of the references under the severall heads, and the Table which we have added in the end. For such lawes and orders as are not of generall concernment

³⁷See Amory, *First Impressions*, p. 43. By the time of the first Harvard College Library Catalogue of 1723, there were sixty-four law books in the Harvard library, most probably acquired in the seventeenth century (Morison, *Founding of Harvard*, pp. 293-97).

³⁸*Lawes and Libertyes*, epistle dedicatory.

*we have not put them into this booke, but they remain still in force, and are to be seen in the booke of the Records of the Court, but all generall laws not heer inserted nor mentioned to be still of force are to be accounted repealed.*³⁹

Finally, once again, there is no mention of the Crown, English authority, or the colonial Charter, except in an extraordinary, backhanded way. With due humility, the Puritan draftsmen could not resist pointing out that, in only eighteen years, their "poor colonie" had done something that "the High Court of Parliament in England" had failed to do in "four hundred years":

*For if it be no disparagement to the wisdom of that High Court of Parliament in England that in four hundred years they could not so compile their lawes, and regulate proceedings in Courts of justice &c: but that they had still new work to do of the same kinde almost every Parliament: there can be no just cause to blame a poor Colonie (being unfurnished of Lawyers and Statesmen) that in eighteen years hath produced no more, nor better rules for a good, and settled Government then this Book holds forth: nor have you (our Bretheren and Neighbours) any cause, whether you look back upon our Native Country, or take your observation by other States, & Common wealths in Europe) to complaine of such as you have imployed in this service; for the time which hath been spent in making lawes, and repealing and altering them so often, nor of the charge which the Country hath been put to for those occasions, the Civilian gives you a satisfactorie reason of such continuall alterations additions &c: Crefcit in Orbe dolus.*⁴⁰

Even in this struggling young colony, its leaders had seen fit to "compile their lawes," something England had yet to achieve!

There is no opportunity here to discuss the provisions of the *Lawes and Libertyes* in detail, for they literally range from "Abilitie" [i.e., age to make a will] to "Wrecks of the sea." Suffice it to say that *Lawes and Libertyes* was a complete legal code of conduct, from baking bread to punishment for murder, much of the law being entirely different from equivalent common law

³⁹*Lawes and Libertyes*, epistle dedicatory.

⁴⁰*Lawes and Libertyes*, epistle dedicatory. The draftsmen also mentioned "his Majestyes grant under the Great Seal of England" under the topic "Fish" in pointing out that "foreign fishermen" could no longer "take timber and wood at their pleasure," for the land was now possessed "and the lands disposed in propietie unto severall towns and persons" (p. 23).

rules, with particular emphasis on the crucial rules of inheritance and dower.⁴¹ Other provisions, largely taken from Ward's "Body of Liberties," explicitly stated fundamental principles of personal freedom for the first time, principles that would later be incorporated into various American bills of rights and similar documents abroad. For example, at the beginning of *Lawes and Libertyes* is found a statement much akin to the later "Due Process Clause" of the American Constitution:

FORASMUCH as the free fruition of such Liberties, Immunities, priviledges as humanitie, civilitie & christianity call for as due to everie man in his place, & proportion, without impeachmēt & infringement hath ever been, & ever will be the tranquillity & stability of Churches & Comon-wealths; & the deniall or deprivall therof the disturbance, if not ruine of both:

It is therfore ordered by this Court, & Authority therof, That no mans life shall be taken away; no mans honour or good name shall be stayned; no mans person shal be arrested, restrained, bannished, dismembred nor any wayes punished; no man shall be deprived of his wife or children; no mans goods or estate shal be taken away from him; nor any wayes indamaged under colour of Law or countenance of Authoritie unles it be by the vertue or equity of some expresse law of the Country warranting the same established by a General Court & sufficiently published; or in case of the defect of a law in any particular case by the word of God. And in capital cases, or in cases concerning dismembing or banishmēt according to that word to be judged by the General Court [1641].⁴²

Under "Iuries" were the safeguards of jury trial later to be incorporated into the Seventh Amendment of the American Bill of Rights, and under "Iustice" was the essence of the famous "Equal Protection Clause" of the American Constitution:

Iustice.

IT is ordered, and by this Court declared; that every person within this Jurisdiction, whether Inhabitant or other shall enjoy the same justice

⁴¹See Wolford, "The Laws and Liberties of 1648," pp. 147, 176-79; George L. Has-kins, "Codification of the Law in Colonial Massachusetts: A Study in Comparative Law," in *Indiana Law Journal* 30 (Fall 1954): 4-5, 10.

⁴²*Lawes and Libertyes*, p. 1.

and law that is general for this Jurisdiction which wee constitute and execute one towards another, in all cases proper to our cognisance without partialitie or delay. [1641]⁴³

The fundamental principles of protection against cruel and abusive punishment and against self-incrimination, now found in the American Constitution and international treaties throughout the world, were articulated under "Torture."

Torture

IT is ordered, decreed, and by this Court declared; that no man shall be forced by torture to confesse any crime against himselfe or any other, unles it be in some Capital case, where he is first fully convicted by clear and sufficient evidence to be guilty. After which, if the Case be of that nature that it is very apparent there be other Conspirators or Confoederates with him; then he may be tortured, yet not with such tortures as be barbarous and inhumane.⁴⁴

Finally, under "Votes," fundamental political rights were ensured for the freemen:

Votes

IT is ordered, decreed and by this Court declared; that all, and everie Freeman, and others authorized by Law, called to give any Advice, Vote, Verdict or Sentence in any Court, Council or civil Assemblie, shall have full freedom to doe it according to their true judgements and consciences, so it be done orderly and inoffensively, for the manner. And that in all cases wherin any Freeman or other is to give his Vote be it in point of Election, making Constitutiōs and Orders or passing Sentence in any case of Judicature or the like, if he cannot see light or reason to give it positively, one way or other, he shall have libertie to be silent, and not pressed to a determinate vote.⁴⁵

And I could go on to detail sections relating to the rights of women and children, the relatively advanced regulation of usury, the provisions for efficient, centralized courts and special

⁴³*Lawes and Libertyes*, p. 32.

⁴⁴*Lawes and Libertyes*, p. 50.

⁴⁵*Lawes and Libertyes*, p. 51.

"piedpoudre"-style courts offering expedited justice for strangers, and the unique provision protecting dumb animals.⁴⁶

Perhaps the most attractive and distinguishing feature of the *Lawes and Libertyes*, however, was its practicality. It appeared in plain English and provided painstaking detail when necessary. Unlike Ward's "Body of Liberties," which had been arranged by theoretical categories, the *Lawes and Libertyes* was set out by topic, in alphabetical order, a format the founders would have encountered in early English law abridgments, such as *Fitzherbert's Abridgement*, and in manuals for justices of the peace, such as Michael Dalton's *The Countrey Justice*.⁴⁷ No learned understanding of how the law is arranged into concepts of property, crime, tort, or constitutional theory was required to use this book. The alphabetical arrangement made the law accessible to the most primitively literate. It could be easily referenced by litigants or magistrates at trial or by colonists ordering their daily

⁴⁶See "Crueltie," *Lawes and Libertyes*, p. 16. "That no man shall exercise any tyranny or cruelty towards any bruit creatures which are usually kept for the use of man." The provisions in "The Body of Liberties" were even more explicit. See Whitmore, *Colonial Laws*, "Off the Bruite Creature," p. 53. In particular, clause 93 is omitted from the later version, "If any man shall have occasion to leade or drive cattel from place to place that is far off, so that they be weary, or hungry, or fall sick, or lambe. It shall be lawful to rest or refresh them, for a competent time, in any open place that is not corne, meadow, or inclosed." Could this be a reflection of Psalm 23?

The "Usurie" provisions were also advanced, reflecting legislation of 1641 and 1643 permitting regulated interest rates.

Usurie.

IT is ordered, decreed & by this Court declared, that no man shall be adjudged for the meer forbearance of any debt, above eight pounds in the hundred for one year, and not above that rate proportionably for all sums whatsoever, *Bills of Exchange* excepted, neither shall this be a colour or countenance to allow any *usurie* amongst us contrary to the Law of God."

Whitmore, *Colonial Laws*, p. 51. These advances reflected similar theoretical and practical reforms in England. See my "The Mystery of the New Fashioned Goldsmiths: From Usury to the Bank of England," in *Comparative Studies in Continental and Anglo-American Legal History*, ed. Vito Piergiorganni (Berlin: Duncker and Humblot, 1993).

⁴⁷*Fitzherbert's Abridgement* (Beale R456-61) was first published in London in 1516. See John D. Cowley, *A Bibliography of Abridgements, Digests, Dictionaries and Indexes of English Law* (London: Selden Society, 1932), p. 3. Michael Dalton's *The Countrey Justice* was first published in 1618 in London but was in a tradition of handbooks for justices of the peace that went back more than a century earlier. Dalton's was one of the books ordered by the General Court in 1647. See J. H. Beale, *A Bibliography of Early English Law Books* (Cambridge: Harvard University Press, 1926), pp. 125-29.

conduct. A person unhappy with the price of bread, for example, could resolve his dispute with the baker by simply referring to the regulations found listed under “Bakers,” in the “B” section of the book. In this sense, the code fulfilled one of its primary purposes: to make the law available to the freemen and the inhabitants. It provided the same access to the laws of the colony as the Bible did to the Laws of God. And the publication of such a bible of civil government had the same potential to popularize the discussion and development of the law that the publication of a vernacular Bible had for the popularization of theology.⁴⁸

The *Laws and Libertyes* proved to be a sound underpinning for the evolving government. Produced in amended editions in 1660 and then again in 1672, the text was systematically updated by the simple expedient of adding *Laws & Orders* each year, printed annually from 15 May 1672 through 16 February 1686.⁴⁹ The system worked effectively without any native law reports or professional legal treatises.⁵⁰ Until the new Charter of 1691, the *Laws and Libertyes* was the law of the Commonwealth, and it functioned successfully for nearly two generations.

Conclusion: Radical Lawmakers

The nature of “radical” legal change has recently consumed countless hours of faculty debate in American law schools.⁵¹ There has been so much controversy, some bitter, that it seems advisable to begin at the beginning, with the word “radical” itself. “Radical” derives, of course, from the late Latin *radicis*, or

⁴⁸For this paragraph, I am indebted to the insight of Mark Walsh.

⁴⁹See Whitmore, *Colonial Laws*, pp. 119, 199–355.

⁵⁰Compare the English law reports and treatises from before 1600 as listed in Joseph Henry Beale, *A Bibliography of Early English Law Books* (Cambridge: Harvard University Press, 1926), pp. 51–174. Beale identified no fewer than 491 different editions of printed English reports and abridgments of reports and over 501 editions of treatises! Except for the book order of the General Court in 1647, described above, there was little evidence of the use of English law books in Massachusetts, particularly law reports, before 1700.

⁵¹See, e.g., the “critical legal studies” debate as personified by Morton J. Horwitz, in *The Transformation of American Law, 1780–1800* (Cambridge: Harvard University Press, 1977), pp. 17–30, and Roberto M. Unger, in *Law in Modern Society* (New York: Free Press, 1976), pp. 192–242.

"roots." The best definition of "radical" is "affecting the foundation" or "going to the root."⁵²

The *Lawes and Libertyes* represented *truly* radical legal change. It was not just a question of the doctrines it expressed, even though there were some quite fundamental differences from English substantive law. Nor was the form of the book radically innovative, for its source could be found in early English abridgments and legal manuals. Rather, it was the *process* resulting in the *Lawes and Libertyes* that was, at its "root," fundamentally different from the world of English law the colonists had left behind them.

Commencing as early as 1636, the Massachusetts "law" committees began a deliberate review of the colonial "legal situation." The abstract models generated by John Cotton and Nathaniel Ward were unlike anything known in English practice, and Ward's "Body of Liberties" was also, in form, a classical code of Roman lineage.⁵³ Only very advanced English and civilian theorists, such as Francis Bacon, had been so bold as to postulate purely abstract models for law reform, and they often tempered their "radicalism" by embodying their ideas as "universal" principles, rather than specific proposals for law reform. Some even took the precaution of posthumous publication.⁵⁴

Self-conscious, abstract models that proposed a total restructuring of a legal system were certainly "radical." It was also "radical" to experiment with such models without any reference to English authorities, or even to the colonial Charter, a point Dr. Child and his followers were quick to make in the *Remonstrance* of 1646. The *Lawes and Libertyes* had more direct references to Latin maxims and to Roman civil law forms than to English law. For colonists on the edge of a wilderness, with all their basic economic and military ties solely to England, this was courage indeed!

⁵²The *Concise Oxford English Dictionary*, 6th ed. (Oxford: Clarendon Press, 1976), p. 918.

⁵³See Haskins, "Codification of the Law in Colonial Massachusetts," pp. 7-10.

⁵⁴See my *Francis Bacon*, pp. 219-97. There were copies of Bacon's *Essays* (1st ed.) and *Advancement of Learning* (1st ed., London, 1605) in the early Harvard library. Indeed, in John Harvard's personal library, given to the college in 1638, there was an *Advancement of Learning* (see Morison, *Founding of Harvard*, pp. 77, 265).

Finally, the *Lawes and Libertyes* was not just a "theoretical" plan for reform. The Massachusetts colonists intended to put their legal ideals into practice, and they did. Bacon, in his *Advancement of Learning* (1605), castigated his English legal contemporaries:

As for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars, which give little light because they are so high. For the lawyers, they write according to the states where they live what is received law, not what ought to be the law: for the wisdom of a lawmaker is one, and of a lawyer is another.⁵⁵

Bacon became Lord Chancellor of England in 1618, but he could not effect his reforms. Even less successful were the "Puritan" radicals who emerged in the context of the English Commonwealth. Their leaders were frequently executed, and the Restoration swept away their proposals. But John Cotton, John Winthrop, Nathaniel Ward, and their colleagues enacted their ideas successfully into law for more than forty years. The *Lawes and Libertyes* went to the "root" of early American society.

Finally, "radical" does not mean "good." Much of the *Lawes and Libertyes* articulated jurisprudence now rejected by liberal societies. As Dr. Child and his allies amply argued in 1646, there was no freedom of religion. As dean of a great Jesuit law school, I carefully noted the regulations falling under the topic "Jesuit." All Jesuits were to be banished, I read, and, if they returned, executed. There was a humane exception, however, if the Jesuit were shipwrecked and left promptly after being rescued.⁵⁶ Witchcraft was a capital offense, the rights of women were constricted, and the topic "Bond-slavery" starts out well enough, "It is ordered by this Court and authoritie therof, that there shall never be any bond-slavery, villenage or captivitie amongst us," but ends, most unfortunately, with a major qualification, "unlesse it be lawfull captives, taken in just warrs, and such strangers as willingly sell themselves, or are solde to us."⁵⁷

⁵⁵Bacon, *Advancement of Learning*, ed. Arthur Johnston (Oxford: Clarendon Press, 1974), p. 198.

⁵⁶*Lawes and Libertyes*, p. 26.

⁵⁷*Lawes and Libertyes*, p. 4.

Yet, the *Lawes and Libertyes* did promise an ultimate moral good, at least to those like myself who believe in the inherent goodness of the rule of law. The drafters' emphasis on the principles of equal protection and due process, even for those who did not consent to the law, were inherently hostile to tyranny and promoted social consensus as an article of faith. As the epistle dedicatory emphasized, "*Qui sentit commodum sentire debet et onus.*"⁵⁸ These were people who believed passionately in the power of law to cure social ills and promote well-being. In the words of Cotton Mather, "The *Reformation of the Law*, and more *Law* for the *Reformation of the World*, is what is mightily called for."⁵⁹

There is one final point that cannot be overlooked in assessing the historical importance of the *Lawes and Libertyes*. We have already noted that radical legal documents from Massachusetts were frequently reprinted in England, often very quickly, and that Massachusetts imprints also found their way to the home country. Whether in the form of Cotton's *An Abstract of the Laws of New England* (London, 1641), *The Capitall Lawes of New-England* (London, 1643), Ward's *Simple Cabler of Agawam* (London, 1646/47), or John Child's *New England's Jonas* (London, 1647, published with a copy of the *Capital Lawes* and the *Freemans Oath*), there was clearly a demand for information about the Massachusetts experiment in the home country, even at a time of great political upheaval.⁶⁰

The *Lawes and Libertyes* appeared in 1648, as the second phase of the English Civil War was raging. Doubtless the Massachusetts colonists knew that the King had lost all real power in

⁵⁸*Lawes and Libertyes*, epistle dedicatory. "He who enjoys the benefit ought also to bear the burden; and the contrary." See *Latin for Lawyers*, p. 217; Broom, *Legal Maxims*, p. 482.

⁵⁹Cotton Mather, *Bonifacius—An Essay Upon the Good that is to be Devised and Designed of those who Desire to Answer the Great End of Life . . .* (Boston, 1710), p. 165. See my introduction to *Law in Colonial Massachusetts*, p. xxi.

⁶⁰By 1640, Charles I's effort to rule without Parliament, the so-called "Eleven Years Tyranny," had failed, and the "short Parliament" had convened. Samuel Eliot Morison has speculated that the New World's Cambridge Press was originally founded to print books to smuggle into England, but, under Cromwell, restrictions on the English presses were soon lifted. See Morison, *Founding of Harvard*, pp. 344–46. This could explain why so many Massachusetts texts were printed in England after 1640.

1646; they also knew that this was an auspicious moment for issuing a code that acknowledged no royal allegiance. Less than a year later, on 30 January 1649, Charles I was beheaded, a revolutionary act that stunned Europe. Of the 600 printed copies of the *Lawes and Libertyes*, the only one surviving, like the two known copies of the *Capitall Lawes* of 1641, was found in England, which raises an interesting question about transatlantic influence.

There is evidence that at least some participants in the English Civil War and some new theories of English government emerging from that struggle were affected by developments in the New World. Certainly English Puritans and the Levellers and Diggers who formed the ideological left wing of Cromwell's New Model Army knew of the exciting experiments in Massachusetts. Writers like Gerrard Winstanley, whose radical *The Law of Freedom in a Platform* appeared in 1652, must have been aware of the London edition of the *Abstract* of 1641, and the 1648 edition of the *Lawes and Libertyes* itself may have been distributed among Puritan radicals.⁶¹ If cross-pollination of radical ideas did occur, some assuredly spread from the New World to Old. Thomas Barnes correctly argues that the *Lawes and Libertyes* was "an important model for the colonists' co-religionists in England who sought—albeit without success—the reform of English law during Cromwell's brief 'Godly commonwealth.'"⁶²

Indeed, if an English jurisdiction had influenced the framers of the *Lawes and Libertyes* at all, it would have been the tiny neighboring colony of Plymouth, which had drafted a manuscript system of laws in 1636.⁶³ This effort, however, was quite primitive and heavily cited English authority. The first printed

⁶¹See Gerrard Winstanley, *The Law of Freedom in a Platform* (London, 1652), ed. Robert W. Kenny (New York: Schocken Books, 1973), pp. 1–40; George H. Sabine, *The Works of Gerrard Winstanley* (New York: Russell and Russell, 1965); Stuart E. Prall, *The Agitation for Law Reform During the Puritan Revolution, 1640–1660* (The Hague: Martinus Nijhoff, 1966); Donald Veall, *The Popular Movement for Law Reform, 1640–1660* (Oxford: Clarendon Press, 1970); G. B. Nourse, "Law Reform under the Commonwealth and Protectorate," *Law Quarterly Review* 75 (October 1959): 512–29.

⁶²Barnes, *Lawes and Libertyes*, p. 9. See also Haskins, *Law and Authority*, pp. 191–92.

⁶³See George L. Haskins, "The Legal Heritage of Plymouth County," in *Essays in the History of Early American Law*, pp. 121, 123–25.

General Laws of . . . New Plimouth did not appear until 1672, from the Cambridge press, which issued the first edition of Connecticut's *The Book of the General Laws* the following year.⁶⁴ Both were clearly indebted to the *Lawes and Libertyes*, which went into its second edition in 1660 and its third in 1672.⁶⁵

But that would not be all. A century later, Americans such as James Otis and John Adams would turn again to the great ideas of the *Lawes and Libertyes*, and, as their own Revolution drew near, they would seek in it models of radical legal reform. Even today, we look with wonder at the bold achievement of the *Lawes and Libertyes*, at its unquenchable optimism, at its faith in law as the guarantor of human dignity. We talk in our twentieth-century classrooms, courts, and law offices about "demystifying" the law, about equal access to legal rights, and about a legal order that all people, rich and poor, empowered and weak, can understand and call their own. This was the dream of the *Lawes and Libertyes*, the dream of a New World. It was the dream of a rule of law. Is it not still our dream?⁶⁶

Thank you.

⁶⁴See the facsimile of *The Book of the General Laws of the Inhabitants of the Jurisdiction of New Plimouth* (Cambridge, 1672), printed in *The Compact with the Charter and Laws of The Colony of New Plymouth*, ed. William Brigham (Boston: Dutton and Wentworth, 1836; reprinted Buffalo: W. S. Hein Co., 1986), pp. 241 ff.; Winship, *Preliminary Check List*, p. 25.

⁶⁵Winship, *Preliminary Check List*, pp. 9, 24. These are reproduced in facsimile in Whitmore, *Colonial Laws of Massachusetts*, p. 119 ff., and in *The Colonial Laws of Massachusetts, Reprinted from the edition of 1672, with the supplements through 1686*, ed. William H. Whitmore (Boston: Rockwell and Churchill, 1890), p. 151 ff.

⁶⁶As Thomas Barnes observed: "To borrow the Civil Law aphorism that the dedicatory epistle uses to justify the making of law, '*Crescit in Orbe dolus*': indeed evil does grow in the world, but known and established laws such as those set forth in the *Lawes and Libertyes* of 1648 provided a foundation not only for the punishment of malefactors but for the preservation of civil liberties. Those two sides of the same coin, the law, have been a fundamental element in the development of this country" (*Lawes and Libertyes*, p. 9).

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APPENDIX

AN ANNOTATED BIBLIOGRAPHY OF PRIMARY SOURCES

Mark A. Walsh

Thomas G. Barnes, ed., *The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts* (San Marino, Calif.: Huntington Library, 1975).

This text was published in photofacsimile from the only surviving copy of the 1648 edition in the Huntington Library. Barnes includes a table identifying the sources of the *Lawes and Libertyes* in colony statutes, in "The Body of Liberties" of 1641, or in established practice. His introduction traces the movement to compile and publish a code that contained all of the laws of the colony from 1635, when the General Court appointed a committee to draft the laws. He reviews the early attempts of the various committees, including Rev. John Cotton's proposal, "Moses his Judicials," which was rejected in favor of Nathaniel Ward's "Body of Liberties," enacted in 1641. Barnes traces the desire for and the success of the 1648 code to the popular impulse to limit magisterial power, a desire that was not sufficiently sated by "The Body of Liberties."

William Brigham, ed., *The Compact with the Charter and Laws of the Colony of New Plymouth* (Boston: Dutton & Wentworth, 1836).

Brigham reprinted from manuscript records and published for the first time the early records of Plymouth Colony. His brief introduction traces the efforts to compile and publish these valuable documents. The collection includes not only the legislative records of the General Court but also several of the most important legal documents relative to the history of the colony, such as the charter and the Mayflower Compact. Included in the legislative record is the revision of laws known as the Plymouth Code of 1636, the first effort of its kind in the English colonies.

John Child, "New England's Jonas cast up at London: Or A relation of the proceedings of the court at Boston in New England against divers honest and godly persons . . ." (London, 1647), in *Tracts and other papers relating principally to the origin, settlement, and progress of the*

colonies in North America, vol. 4, no. 3 (Washington, D.C.: P. Force, 1836-46).

Written by the brother of Dr. Robert Child, this pamphlet represents another volley in the controversy over the *Child Remonstrance*. In a lecture delivered shortly before John Child sailed from New England with a copy of the *Remonstrance* and his brother's petition to Parliament, Rev. John Cotton, a leading Puritan theocrat, declared that the *Remonstrance* would be as a Jonas to the ship carrying it and exhorted the ship's master to throw it overboard should a storm arise so that the ship might be saved. In the pamphlet Child rebuts this theory, and, to bring the controversy to the public in England, provides a brief account of the fortunes of the remonstrants and reprints their petition to the General Court, the *Freeman's Oath*, and the *Capital Lawes of New England*.

M. Farrand, ed., *The Laws and Liberties of Massachusetts* (Cambridge: Harvard University Press, 1929).

Farrand's edition of the *Laws and Liberties* is the most useful because it reprints the original and is therefore more easily read than Barnes's facsimile. Farrand offers a brief introduction which recounts the history of the manuscript and its discovery in the library of the Mayor of Rye, England.

J. K. Hosmer, *Winthrop's Journal: A History of New England*, 2 vols. (New York: C. Scribner's Sons, 1908).

An authoritative source for the early history of Massachusetts. Given Winthrop's position as Governor for much of the early history of the colony, his journal provides us with a remarkable view into the thoughts and actions of the colony's decision makers. Winthrop's accounts of all of the great events and controversies of the period, although not always the most objective, are invaluable. His work is especially useful in recording the political developments and arguments that culminated in the 1648 Code.

Thomas Hutchinson, *Hutchinson Papers: A Collection of Original Papers Relative to the History of the Colony of Massachusetts Bay* (Albany: J. Munsell, 1865; reprinted, New York: B. Franklin, 1967).

This collection of original documents is an extraordinarily valuable resource for the early history of the Massachusetts colony. Preserved by one of the earliest historians of the colony, who was ironically one of

its most unpopular royal Governors, the collection shows little indication that it is distorted by the ideological bent of its author.

John Cotton, "An Abstract of the Laws of New England" (1641), in *Hutchinson Papers* (as above), pp. 181–205.

The *Abstract* reprinted in Hutchinson's papers is from the edition of 1655 published in London by William Aspinwall. Contrary to its title, the *Abstract* was never adopted by the colony but was merely a proposed code presented by John Cotton in 1636. Also known as "Moses his Judicials," Cotton's code derives its authority entirely from biblical sources. The proposal was rejected in favor of Nathaniel Ward's "Body of Liberties."

"The Child Remonstrance" (1646), in *Hutchinson Papers* (as above), pp. 214–23.

This petition, which caused a constitutional crisis in the colony and provoked vigorous rebuttal and recrimination from the theocracy, was the first confrontation between the Puritan experiment and the authority of English law. The remonstrants challenged the restriction of freemanship, and thus the right to vote or hold office, to members of the Puritan churches. They also challenged the General Court's deviation from English law. The petition struck a sensitive nerve precisely because these restrictions on admission to freemanship and the establishment of their own legal system were the primary means by which the Puritan leaders hoped to control the development of their "City Upon a Hill."

"The Declaration of 1646," in *Hutchinson Papers* (as above), pp. 223–47.

The General Court's response to the Child Remonstrance, this document is the leaders' attempt to refute the accusation that they were violating their Charter and governing by laws contrary to the laws of England. The veracity of their argument has been expertly examined by Richard B. Morris in his article, "Massachusetts and the Common Law: The Declaration of 1646," in *Essays in the History of Early American Law*, ed. David H. Flaherty (Chapel Hill: University of North Carolina Press, 1969), pp. 135–46. The text of the document is most revealing in that it demonstrates the legal sophistication of the colony's lawmakers and their familiarity with classical literature. Indeed, the similarities in literary style to *The Simple Cobbler of Agawam in America*

indicate that the Declaration may also have been authored by Nathaniel Ward.

George H. Sabine, *The Works of Gerrard Winstanley* (New York: Russell and Russell, 1965).

Sabine offers a lengthy introduction that provides an account and analysis of the development of Winstanley's political thought. He includes a biography, an account of Winstanley's career, and a useful comparison of the Leveller and Digger movements. Sabine also provides a detailed discussion of the *Law of Freedom*, placing it in the context of the previous failure of the communist experiment at Cobham and Cromwell's rise to power. Essentially a discourse on government, the *Law of Freedom* includes a detailed plan for the exercise of authority within the commonwealth by its various officers, a definition of the law, and a code of law based on Scripture. Winstanley proposes short and pithy laws that can be read by the people, as could Moses's *Judicials*, which would obviate the need for legal professionals. In terms of law reform, Winstanley followed much the same path as that already trod by the Massachusetts lawmakers.

Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies now or heretofore forming the United States of America*, vol. 3 (Washington: Government Printing Office, 1909), pp. 1827–86.

Published by an act of Congress, this compilation of documents pertaining to the founding of the colonies and states is an invaluable resource. Under Massachusetts, it contains the charters of New England (1620), New Plymouth (1629), Massachusetts Bay (1629), the Mayflower Compact (1620), and the second Charter of Massachusetts Bay (1691).

Nathaniel Ward, "The Body of Liberties of 1641," in *The Colonial Laws of Massachusetts. Reprinted from the edition of 1672, with the supplements through 1686. A Bibliographic Sketch of the Laws of the Massachusetts Colony from 1630 to 1686*, ed. William H. Whitmore (Boston: Rockwell and Churchill, 1890).

Whitmore offers a lengthy introduction in which he discusses the movement toward codification that resulted in the promulgation of "The Body of Liberties." His account is drawn from the Records of the Colony and from Winthrop's *History*. Whitmore also recounts the cir-

cumstances surrounding the *Child Remonstrance* and the General Court's response in the *Declaration of 1646*. Published prior to the discovery of the 1648 copy of the *Lawes and Libertyes*, Whitmore's introduction contains his speculations as to the content of the 1648 code based on the 1660 revision of the code and other references to it in the colony records.

Nathaniel Ward, *The Simple Cobler of Agawam in America* (London 1647), ed. P. M. Zall (Lincoln: University of Nebraska Press, 1969).

Published in London in 1646, the *Simple Cobler* was written by Ward while in Massachusetts and is evidence of the scholarship of the drafters of the Massachusetts code. The introduction by editor Paul M. Zall provides a brief account of Ward's career and an interesting discussion of the common contemporary literary figure of a Cobbler. Ward assumes the role of a frontier shoemaker to frame his comments on the great controversies of the civil war. He advocates a return to religious intolerance in order to ensure the purity of the Protestant religion and denounces the tolerance of papists or radical Protestants. Ward also admonishes the King for his evil ways and calls for a compromise with Parliament to return the country to peace and stability. Most noteworthy in this work is Ward's literary style, which demonstrates his fine classical education. He relies heavily on the wisdom of the ancients and liberally cites classical authors as well as the Bible.